The Endless Judicial Selection Debate and Why It Matters for Judicial Independence

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The Endless Judicial Selection Debate and Why it Matters for Judicial Independence

CHARLES GARDNER GEYH*

In this overview, I begin by describing the five different systems of state judicial selection that have evolved out of a perennial struggle to strike an optimal balance between judicial independence and judicial accountability. I then explore recent developments that have intensified that struggle before analyzing, with reference to available research, how different selection systems counter or accommodate such developments. My purpose here is not to write (another) position piece. Rather, my purpose is to step back and contextualize disputes over judicial selection with reference to the independence and accountability issues that animate them, and to isolate what we know and don’t know about the assumptions that underlie the arguments of the disputants, so as to better frame future study and debate.

I. JUDICIAL INDEPENDENCE, ACCOUNTABILITY AND SELECTION: THE PERENNIAL STRUGGLE

Within the legal community judicial independence is understood not as an intrinsic good or an end in itself, but as a means to achieve other ends. It is thought that if judges are independent—if they are insulated from political and other controls that could undermine their impartial judgment—they will be better able to uphold the rule of law, preserve the separation of powers, and promote due process of law.¹ Scholars, judges and lawyers often acknowledge that judicial independence has institutional and decisional dimensions. Institutional independence concerns the capacity of the judiciary as a separate branch of government to resist encroachments from the political branches and thereby preserve the separation of powers. Decisional independence, in contrast, concerns the capacity of individual judges to decide cases without threats or intimidation that could interfere with their capacity to uphold the rule of law.²

Properly understood, then, judicial independence is circumscribed by the

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purposes it serves: Decisional independence, for example, does not mean freedom from all external constraints, but only those constraints that interfere with a judge’s capacity to uphold the rule of law. Indeed, some forms of independence from decisional constraint, such as the freedom to decide cases for the benefit of friends or in exchange for bribes, are antithetical to the rule of law values that judicial independence is supposed to further. And so, if judicial independence is to achieve its goals, it must operate within specified constraints. It must, in other words, be tempered by judicial accountability.

Like judicial independence, judicial accountability is not an end in itself. It too serves other ends: To promote the rule of law, institutional responsibility, and public confidence in the courts. And like judicial independence, judicial accountability has multiple forms. Institutional accountability mechanisms hold judges answerable collectively for their conduct as a separate branch of government (e.g., by subjecting court budgets to legislative oversight). Behavioral accountability mechanisms hold individual judges to account for their conduct on and off the bench (e.g., by subjecting them to discipline for being abusive to litigants or accepting inappropriate gifts from lawyers who appear before them). And decisional accountability makes judges answerable for their judicial rulings (e.g., by subjecting their decisions to appellate review). As to decisional accountability, however, suitable mechanisms are ideally limited to those that promote the rule of law by correcting judicial error. Mechanisms that go further, and subject judges to threats or controls, could cause judges to disregard the law and implement the preferences of those who threaten or control them, to the detriment if not the demise of decisional independence.

Accepting for the moment the premises of the legal model (I revisit those premises later), the perennial policy struggle is to strike an optimal balance between judicial independence and accountability, to ensure that judges are independent enough to follow the facts and law without fear or favor, but not so independent as to disregard the facts or law to the detriment of the rule of law and public confidence in the courts. The American Bar Association’s Model Code of Judicial Conduct (“Model Code”), some variation of which has been adopted by almost every state supreme court, seeks to structure judicial conduct to preserve this balance. The 2007 Code tells judges that they “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary”; “shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially”; “shall not be swayed by public clamor or fear of criticism”; “shall not permit family, social, political,

5. MODEL CODE R. 2.2
6. MODEL CODE R. 2.4(A).
financial, or other interests or relationships to influence the judge's judicial conduct or judgment"; and "shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

In the context of judicial selection, the struggle to balance independence and accountability has played itself out over the course of more than two centuries, as five distinct methods of selecting judges—each striking the balance in different ways—have vied for preeminence. In the fledgling states, all judges were selected by one of two methods: Gubernatorial appointment with legislative confirmation (five states) or legislative appointment (eight states). The colonial courts had been unhappily dependent on the crown, and the new states were committed to curbing their judiciaries' dependence on the executive branch. This is not to say, however, that the new states were committed to an independent judiciary. Several states subjected their judges to a variety of legislative branch controls, including re-appointment, which led to a series of independence-threatening confrontations with state legislatures during the 1780s that troubled the framers of the U.S. Constitution enough to embed in Article III tenure and salary protections for federal judges.

During the Jacksonian era of the 1820s and 1830s, populist calls for judicial accountability initiated a movement to select judges via a third method: Partisan judicial elections. Although the early impetus for partisan judicial elections may have been a desire for greater accountability, the partisan election movement did not take hold until after the Jacksonians lost influence, led by reformers who argued that elected judges who derived their authority from the people would be more independent-minded than hand-picked friends of governors, or jurists subject to the beck and call of legislatures. Indeed, Caleb Nelson found that the impetus of the judicial election movement was a desire to promote judicial independence from the political branches, rather than to increase democratic accountability for judicial decisions. Mississippi broke the ice in 1832, and by 1909, thirty-five states either entered the Union with judiciaries selected by partisan election or had converted to partisan elections from appointive

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7. MODEL CODE R. 2.4(B).
8. MODEL CODE R. 2.4(C).
10. GEYH, supra note 2, at 24-29.
“By the early twentieth century,” Steven Croley writes, “elective judiciaries were increasingly viewed as plagued by incompetence and corruption.”

During the Progressive era, worries that partisan elections led to the selection of less than capable and qualified judges who were beholden to party bosses culminated in a fourth form of judicial selection: The nonpartisan election. By 1930, eleven new states had adopted non-partisan elections as the selection method for their judiciaries. In the minds of some, however, non-partisan elections left voters with precious little information upon which to cast an informed ballot, which led to the selection of less capable and qualified judges. In the minds of others, contested elections—partisan or not—failed to divorce judges sufficiently from the political process. In 1913, a fifth method of judicial selection was devised: A “merit selection” system, in which judges were appointed by the governor from a pool of candidates whose qualifications had been reviewed and approved by an independent commission. Judges so appointed would then run unopposed later in periodic retention elections, where voters would decide whether the judge in question should be retained for another term. Missouri adopted the first merit selection plan in 1940. By 1989, twenty-three states had commission-based appointive systems (with and without retention elections) to select some or all of their judges.

More recently, the merit selection movement has stalled. Constitutional amendments to install merit selection systems in Florida, Michigan, Ohio, and South Dakota have been rejected by voters. Reformers in other jurisdictions have struggled unsuccessfully to place merit selection proposals on their ballots. And in some merit selection states, there have been calls for a return to contested elections.

Meanwhile, non-partisan elections have enjoyed a renaissance. Arkansas, Florida, Georgia, Kentucky, Louisiana, and North Carolina moved from partisan to non-partisan election systems in the past thirty years. And in 2003, the American Bar Association retreated from its previous position of exclusive support for merit selection to a more nuanced series of positions, one being that

16. JUDICIAL REFORM IN THE STATES, supra note 9, at 7.
18. Id. at 210.
"[f]or states that retain contested judicial elections as a means to select or reselect their judges, the Commission recommends that all such elections be non-partisan and conducted in a non-partisan manner."19

Today, the American Judicature Society reports20 that at the supreme court level, three states select judges by gubernatorial appointment,21 two by legislative appointment, eight by partisan election, thirteen by non-partisan election, and twenty-five by merit selection.22 At the intermediate appellate level, two states select judges by gubernatorial appointment,23 two by legislative appointment, six by partisan election, eleven by nonpartisan election, and eighteen by merit selection.24 Finally, at the trial level, two states select judges by gubernatorial appointment,25 two by legislative appointment, nine by partisan election, eighteen by non-partisan election, seventeen by merit selection,26 and four by a combination of methods. It should be added that, even in states that employ contested elections, judges are often initially appointed by governors to fill the unexpired terms of retiring incumbents.

II. RECENT DEVELOPMENTS: THE PERENNIAL STRUGGLE INTENSIFIED

Each of the five methods of judicial selection described above had its heyday at a different point in American history. Consensus on the optimal method of judicial selection has been elusive. Many have asserted that this is because there is no perfect method of judicial selection, or, more harshly, because there is no good method of judicial selection.27 A more charitable explanation may be that


21. Id. at 6. Of these four states, two subject judges to reappointment after a term of years, and a third subjects judges to periodic retention elections.

22. Id. Of these twenty three states, sixteen subject merit-selected judges to periodic retention elections, five subject them to reappointment after a term of years, and two appoint them for life or until a specified age.

23. Id. at 5. Of these two states, one subjects judges to periodic retention elections, and the other to reappointment after a term of years.

24. Id. Of these eighteen states, fourteen stand for periodic retention election after a term of years, three are subject to reappointment, and in one, judges serve until a specified age.

25. Id. at 4. In two of these states, trial judges are subject to reappointment and in the third judges serve until a specified age.

26. Id. Of those fourteen states, seven subject judges to periodic retention elections, four subject judges to reappointment, one subjects them to non-partisan elections after a term of years and in two states judges serve for life or until a specified age.

27. JUDICIAL REFORM IN THE STATES, supra note 9, at 15-16 ("What the sum of these studies of state systems of judicial selection and efforts to reform those systems tell us is that . . . there is no ideal selection system . . . . Instead, as one of our co-authors, Jim Drennan once said, 'The experience with the selection of judges in the states proves conclusively that there is no good way to select judges.'"); JUSTICE IN JEOPARDY,
the objective of a “good” selection system—an optimal balance between judicial independence and accountability—is an ever-moving target that generates perennial calls for reform. In recent years, the reform engine has been fueled by a series of developments that have “politicized” state judicial elections in arguably unprecedented ways.

A. HEIGHTENED TWO-PARTY COMPETITION

Partisan judicial elections can be relatively sleepy affairs in states where a single political party is predominant and the outcome of judicial races is all but assured. Conversely, as Alan Tarr observes, “in states in which party competition is intense and in which parties establish clear ideological identities, the intensity tends to spill over into judicial elections.”28 In recent years, significant two-party competition has become commonplace in states and regions that traditionally were within the control of only one party:

One of the most dramatic changes during the latter half of the twentieth century was the spread of two party competition throughout the nation. Many states that at one time were dominated by a single party, particularly in the South and New England, now regularly conduct highly competitive elections.29

Studies of judicial reform in North Carolina and Texas link recent selection reform efforts there to the intensification of two-party competition for judicial office.30

B. THE CHANGING NATURE OF SUPREME COURT DOCKETS

As caseloads increased throughout the twentieth century, states sought to relieve docket pressures on their supreme courts by establishing intermediate courts of appeal and making their supreme courts' appellate jurisdiction discretionary. Armed with the discretion to set their own agendas, supreme courts have increasingly allowed the intermediate courts of appeals to have the final word in garden-variety disputes where appellate review is limited to correcting trial court errors, and confined their dockets to more controversial cases in which

supra note 19, at 69 (“Professor Paul Carrington and Adam Long report on a state chief justice who ‘not long ago declared that there is no method of selecting and retaining judges that is worth a damn. He was not the first to express that wisdom.’ Although we need not go quite that far, it is fairly said that there is no perfect selection system.”).


29. Id.

30. James Drennan, Judicial Reform in North Carolina, in JUDICIAL REFORM IN THE STATES, supra note 9, at 19, 26-27; Anthony Champagne, Judicial Reform in Texas, in JUDICIAL REFORM IN THE STATES, supra note 9, at 93, 94-100. But see Melinda Gann Hall, Competition as Accountability in State Supreme Court Elections, in RUNNING FOR JUDGE, supra note 17, at 165, 179-80 (finding that the “partisan transformation of the south” offers only a partial explanation for heightened competition in supreme court races).
the law is unclear and their primary mission is to "say what the law is." The net effect has been to highlight the policy-making role that state supreme courts play when filling gaps in constitutional and statutory law and making common law.\textsuperscript{31}

In a related development, Emily Van Tassel explains that "the politicization of state constitutional decision-making coincides with the 'new Federalism' of the Reagan era and the willingness of many state appellate courts to look to their own constitutions for guidance in many areas of law previously left to the federal constitution."\textsuperscript{32} That, in turn, has served to "raise the profile of state court judges and make control over state judgeships seem more significant to a greater range of interest groups than in the recent past."\textsuperscript{33} To the extent that judges are perceived as making constitutional policy when called upon to interpret their constitutions in new and different ways, it may blur the distinction between judges and legislators in the public mind and intensify calls to hold judges politically accountable for their decisions.

C. INCREASED SPENDING IN JUDICIAL RACES

As two-party competition has intensified and the political profile of state supreme courts has elevated, campaign spending in judicial races has increased. Average campaign spending in contested supreme court races has increased from $364,348 in 1990, to $892,755 in 2004.\textsuperscript{34} In 2000, judicial candidates in supreme court races raised $45 million;\textsuperscript{35} in 2002, they raised $29 million;\textsuperscript{36} and in 2004, they raised $42 million.\textsuperscript{37} While these numbers appear to vary wildly, when "outlier" races in Alabama, Illinois, and West Virginia are excluded, spending in the fourteen remaining states that held supreme court elections in 2004 increased by 163% from 2002, and in 2002, spending increased by 167% from 2000.\textsuperscript{38} Between 2004 and 2006, average spending on advertising in supreme court races increased from $1.5 million to $1.6 million; in that time, the median amount

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\textsuperscript{31} PAUL CARRINGTON, DANIEL MEADOR, & MAURICE ROSENBERG, JUSTICE ON APPEAL 150 (1976).
\textsuperscript{32} Emily Field Van Tassel, Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries, app. E at 3, in JUSTICE IN JEOPARDY, supra note 19.
\textsuperscript{33} Id.; see also Chris Bonneau, The Dynamics of Campaign Spending in State Supreme Court Elections, in RUNNING FOR JUDGE, supra note 17, at 59, 64-65; Owen Abbe & Paul Herrnson, Public Financing for Judicial Elections? A Judicious Perspective on the ABA's Proposal for Campaign Finance Reform, 35 POLITY 535, 539 (2003).
\textsuperscript{34} Chris Bonneau, The Dynamics of Campaign Spending in State Supreme Court Elections, in RUNNING FOR JUDGE supra note 17, at 63.
\textsuperscript{36} Id. (citing Press Relase, Justice at Stake Campaign, 2004 State Supreme Court Election Overview (Mar. 9, 2005)).
\textsuperscript{37} Id.
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When it comes to fundraising, the focus of attention has been on supreme court races, where competition for judicial office has been stiffest. Even so, a survey of over 2400 judges conducted in 2001 found that 45% of lower court judges felt under pressure to raise money for their campaigns during election years, as compared to 36% of high court judges. In the 2005-2006 election cycle, for example, trial lawyers and corporate interests in a southern Illinois race combined to give more than $3.3 million to two candidates for a seat on the state court of appeals, quadrupling the state record. Madison County witnessed a $500,000 trial court campaign, and a Missouri trial court judge was defeated after an out-of-state group poured $175,000 into a campaign to defeat him.

D. INCREASED INTEREST GROUP INVOLVEMENT IN JUDICIAL CAMPAIGNS

Coinciding with the advent of big league spending in judicial campaigns and with heightened two-party competition is the advent of big league interest group involvement. Such involvement often comes in the form of direct contributions to judicial candidates and independently organized campaigns in support of or opposition to the candidates. The lion’s share of interest group spending has been on a cluster of issues, traveling under the umbrella of “tort reform,” that concern judicial rulings on issues relating to punitive damages, products liability, medical malpractice, and insurance liability. As Deborah Goldberg explains, “the tort wars have pitted the plaintiffs’ bar and labor unions, aligned with Democratic candidates, against the defense bar and business, aligned with Republicans.” Thus, in 2006, the two highest sources of contributions were business interests and lawyers, with 44% of all funds donated by the former and 21% by the latter. Outside of groups devoted to the tort reform issue, there have been other interest groups that have actively sought to defeat incumbents (sometimes successfully) because of an opinion a judge wrote or joined on such issues as capital punishment, criminal sentencing, abortion, gay rights, education funding, and water rights.

E. INCREASED NEGATIVE TENOR OF JUDICIAL CAMPAIGNS

As James Gibson notes, “the use of attack ads in judicial elections is a
relatively new phenomenon." In 2004 and 2006, approximately 20% of all ads were negative. Increased spending in judicial campaigns and increased interest group involvement has brought a greater emphasis on negative advertising. In a 2001 poll of judges, 54% of trial judges and 54% of supreme court justices reported that the conduct and tone of judicial campaigns had gotten worse in the preceding five years. Until quite recently, interest groups and political parties were responsible for the lion's share of negative television advertising—almost 90% as of 2004; but in 2006, the candidates themselves sponsored 60% of the negative advertising.

F. ETHICAL LIMITS ON CAMPAIGN CONDUCT AFTER REPUBLICAN PARTY OF MINNESOTA V. WHITE

Since the 1970s, codes of judicial conduct have imposed significant restrictions on judicial speech and association during judicial campaigns. First, judges have been subject to restrictions on what they can say about issues that may come before them as judges: The 1972 Model Code of Judicial Conduct forbade judges from announcing their positions on disputed issues (the "announce clause"), while the 1990 and 2007 Model Codes prohibit judicial candidates from making pledges, promises or commitments. Second, the Codes restrict a judge's political activities: For example, judges must not serve as officers in, contribute to or make speeches on behalf of political organizations; they must not publicly oppose or endorse other candidates; and they must not solicit campaign funds other than though their campaign committees. By limiting what judges can say and do in election campaigns, codes of conduct seek to prevent judicial candidates from becoming fully embroiled in the political process and from turning judicial races into referenda on their express or implied plans to decide future cases in specific ways.

In Republican Party of Minnesota v. White, the United States Supreme Court invalidated the announce clause, holding that judicial candidates have a First Amendment right to state their views on issues that may come before them later, as judges. In the aftermath of White, the American Bar Association made modest adjustments to the Model Code in 2003: it deleted a clause that subjected judges to discipline for appearing to make commitments (but made apparent

44. James Gibson, Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns 7 (Mar. 21, 2007) (unpublished manuscript, on file with the author).
45. SAMPLE, JONES, & WEISS, supra note 39, at 8, n.6.
46. JUSTICE IN JEOPARDY, supra note 19, at 38.
47. SAMPLE, JONES, & WEISS, supra note 39, at 8.
48. MODEL CODE OF JUDICIAL CONDUCT Canon 7 (1972).
49. MODEL CODE R. 2.10(B); MODEL CODE R. 4.1(A)(13); MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10), 5A(3)d(1)(1990) [hereinafter 1990 MODEL CODE].
50. MODEL CODE R. 4.1(A); 1990 MODEL CODE Canon 5A(1); 1990 MODEL CODE Canon 5C(2).
commitments a new basis for disqualification), and retained the general prohibitions on pledges, promises, commitments, and political activities.\textsuperscript{52}

Beginning in 2003, the ABA's Joint Commission to Revise the Model Code of Judicial Conduct revisited the Model Code's restrictions on campaign speech and conduct, as part of a larger project to revise the entire Code. The Commission considered three possible courses of action.\textsuperscript{53} First, it considered embracing the spirit of White by deregulating campaign speech and conduct generally, as North Carolina had done. Second, it considered the midrange option of retooling the political activities canon to accommodate some specific post-White rulings of the lower courts, which would require the Commission to eliminate several restrictions on political activities and narrow significantly, if not eliminate the pledges, promises, and commitments clause. Third, it considered the conservative approach of limiting the reach of White to its holding, and staying the course pending further clarification of White from the Supreme Court.

A majority of the Commission remained concerned that the impact of White on judicial campaigns was deleterious, and was reluctant to deregulate campaign speech and conduct beyond what was required by the letter of the Supreme Court's holding. After lengthy deliberations spanning nearly four years, the Commission effectively chose the third option described above, retaining existing restrictions on campaign speech and conduct in the political activities canon. Instead of deregulating campaign speech, the Commission focused its efforts on restructuring new Canon 4 (former Canon 5) to improve clarity and specificity, as the ABA's Report to the House of Delegates explained:

Much of the material in Canon 5 was retained, but was reorganized along several axes. The reorganized Canon 4 differentiates more clearly between sitting judges who are and are not also judicial candidates and nonjudges who become candidates. Canon 4 continues to differentiate between judicial candidates running in public elections and those seeking appointment, and, within the former category, it further differentiates between partisan, nonpartisan, and retention elections.\textsuperscript{54}

In the aftermath of White, judicial candidates have challenged remaining restrictions on their campaign speech and conduct in the lower courts, and while the results have been somewhat mixed, the trend has favored the challengers. Several courts have invalidated the pledges and promises clause, while others

\textsuperscript{52} See Model Code R. 2.10(B); Model Code R. 2.11(A)(5); Model Code R. 4.1(A)(13).

\textsuperscript{53} I served as Co-Reporter to the Commission and was in attendance at all Commission meetings. The views expressed here, however, are my own and are not necessarily shared by the Commission or its members.

have struck down restrictions on political activities. The United States Court of Appeals for the Eighth Circuit, revisiting other issues presented by the White case on remand from the Supreme Court, held that Minnesota could not discipline judicial candidates for engaging in partisan activities (notwithstanding Minnesota’s purported interest in preserving the nonpartisan character of its judicial elections), or bypassing their campaign committees and soliciting funds directly from groups.

Since 2002, when White was decided, interest groups on the political left and right have capitalized on the decision by submitting questionnaires to the candidates that solicit the candidates’ views on a range of issues likely to come before them as judges, which the candidates ignore at their peril. Indeed, some interest groups have been explicit about supporting only those candidates that respond.

III. THE IMPLICATIONS OF RECENT DEVELOPMENTS FOR JUDICIAL SELECTION REFORM

If Professor Roy Schotland had licensed his characterization of judicial races as “noisier, nastier and costlier” when he made the statement in the 1980s, the royalties would have made him a rich man today. Accompanying the noise, the nastiness, and the cost is a fundamental shift in the justification for elected judiciaries: Judicial elections were originally introduced primarily to promote judicial independence by liberating judges from the control of governors and legislators, but they have since morphed into tools that serve primarily to promote judicial accountability. There seems to be a general consensus that the recent developments described in the preceding section are making judicial elections look and feel more like conventional political branch races, in the sense of being more competitive and costly, with more interest groups taking sides in more acrimonious contests, and more candidates taking positions on the often policy-laden issues that the candidates will be called upon to resolve as office-holders. Where the consensus breaks down is as to whether these developments are welcome and which judicial selection system is best suited to counter or accommodate them.

56. Republican Party of Minn. v. White, 416 F.3d 738, 766 (8th Cir. 2005) (en banc).
57. Deborah Goldberg, Interest Group Participation in Judicial Elections, in RUNNING FOR JUDGE, supra note 17, at 84.
58. Caulfield, supra note 38, at 5; see also SAMPLE, JONES, & WEISS, supra note 39, at 30-34.
59. Reformers behind the original partisan election movement exhibited less concern for promoting democratic accountability than enhancing judicial independence. As F. Andrew Hanssen explains, “Judicial elections were intended, first and foremost, to provide judges with an independent power base that would enable them to stand up to legislative pressure.” Hanssen, supra note 11, at 447.
A. PARTISAN ELECTIONS

Contemporary proponents of partisan judicial elections proceed from the premise that, in a democratic republic, voters should choose the public officials who govern them and should be able to hold them accountable for their performance in office. Underlying this premise is the general assumption that judges are not significantly different from other public officials, or are not different in ways that warrant a different system of selection. A related assumption is that voters in judicial and political branch races are comparably motivated and equipped to distinguish good candidates from bad—or at least that voters in judicial races are not so unmotivated and ill-equipped as to undermine the legitimacy of the choices they make.

In an article I wrote several years ago, I questioned whether voters in judicial elections were adequately motivated and informed to hold judges accountable in a meaningful way, by pointing to data showing that a substantial majority of the public did not vote in judicial races and was unfamiliar with the candidates. Recent research suggests that my concern was well-founded in traditional, less competitive races. Available data confirms an often substantial “roll-off” in judicial races, in which voters who come to the polls vote in executive and legislative branch races but not in judicial. The roll-off is commonly attributed to a lack of information about the candidates, and indeed, in a poll of American voters conducted in 2001, 73% reported that they had only some or a little information about judicial candidates, while 14% reported having none. In their study of judicial elections in the news, Brian Schaffner and Jennifer Segal Diascro conclude that “we should not be surprised to find citizens lacking information about judicial races” because “citizens turning to newspapers for information on state supreme court campaigns will find a dearth of coverage on these contests.”

It can be argued, however, that more competitive judicial races, particularly in a post-White environment, are increasing voter interest and information levels enough to hold judges meaningfully accountable. In a comparison between two Ohio Supreme Court races, Laurence Baum and David Klein found that the voter

60. Geyh, supra note 41, at 53.
62. Lawrence Baum & David Klein, Voter Responses to High-Visibility Judicial Campaigns, in RUNNING FOR JUDGE, supra note 17, at 140, 141.
64. Brian Schaffner & Jennifer Segal Diascro, Judicial Elections in the News, in RUNNING FOR JUDGE, supra note 17, at 115, 134.
65. In my defense, I acknowledged this development when White was decided, but argued that the kind of accountability that highly competitive elections promote is inconsistent with judicial independence and impartiality. See Geyh, supra note 41, at 64.
roll-off rate was twice as high for the low visibility race as for the hotly contested one (although they also found that in the hotly contested race, voters acquired only a slender grasp of the issues at stake). Melinda Gann Hall observes that "without the excitement generated by hard-fought campaigns from contending candidates, information upon which to cast votes is poor, and voters are disinterested and unmotivated to participate." Now that judicial elections have become noisier, nastier and costlier, we have more challengers and more defeated incumbents, leading Hall to conclude that "when we consider tangible indicators of electoral accountability, we see that, under most situations, supreme court elections perform quite well, particularly in the last decade or so." Rachel Caulfield found that in the post-White era, states that have deregulated judicial speech the most "are seeing a change in how candidates promote themselves and how they attack their opponents," leading her to conclude that "it is entirely possible that judicial candidates in these states will increasingly rely on the ability to distinguish themselves from their opponents based on controversial issue positions." Schaffner & Diascro concur that after White, "candidates may be more likely to speak out on a wider array of topics during campaigns, a dynamic that would produce more news for reporters to cover," which they view as a welcome development "if judicial elections are to compel accountability in the judiciary.

Recent data thus reveal that the brave new world of expensive, high-profile, hotly contested judicial races creates greater voter interest, puts incumbents at higher risk of defeat, and to that extent promotes "accountability"—in an unvarnished sense of the term. Hall is quite explicit about the kind of accountability that judicial elections facilitate:

Electoral competition enhances the ability of voters to voice disapproval of incumbents and remove unpopular ones, thereby bringing the judiciary better in line with citizen preferences. Moreover, competition serves to structure the decisions of judges once on the bench when judges' preferences are inconsistent with those of their constituencies.

And since competition is the most intense in partisan races, the argument concludes, it is in partisan races that judicial accountability of this kind will be

67. Melinda Gann Hall, Competition as Accountability in State Supreme Court Elections, in Running for Judge, supra note 17, at 166.
68. Id. at 183.
71. Melinda Gann Hall, Competition as Accountability in State Supreme Court Elections, in Running for Judge, supra note 17, at 166.
promoted most effectively.

The critical question is whether this is the kind of accountability that we want judicial elections to promote. If, as Hall and a significant segment of the political science community believe, independent judges are essentially unconstrained policymakers who decide cases by acting on their personal "preferences" or "attitudes," then the answer would seem to be yes, because elections will produce "public policies that better represent the citizenry" by "creating incentives for judges to pay attention to citizen preferences when deciding highly visible and publicly salient issues."72

If, on the other hand, as the mainstream legal community believes, independent judges do their best to follow "the law," flexibly defined (and consistent with the legal model described at the beginning of this paper), then the answer is presumably no, because elections create incentives for judges to set the law to one side and "pay attention to citizen preferences" when deciding cases. Indeed, the judge who openly defers to the electorate's preferences when deciding cases exposes herself to discipline and removal for violating multiple rules in the Model Code of Judicial Conduct: The duty not to be swayed by public clamor or fear of criticism; the duty to uphold and apply the law and perform all duties of judicial office impartially; and the duty to act at all times in a manner that promotes public confidence in the independence and impartiality of the judiciary.73

The "attitudinal model" of judicial decision-making74 that drives the thinking of many political scientists is only now beginning to be challenged in a serious way by scholars within the legal community.75 I cannot do that debate justice here; suffice it to say, however, that its implications for judicial selection are considerable.

B. NONPARTISAN ELECTIONS

Devotees of non-partisan elections proceed from the assumption that judges are different from other elected officials in ways that justify a different selection process: Whereas governors and legislators may follow partisan agendas, judges must follow the law. Those who favor non-partisan elections worry that recent politicization of judicial races has made "politicians" of judges, whose election increasingly turns on their currying favor with contributors, interest groups and voters by signaling in advance how they are likely to rule on hot-button legal issues that may come before their courts. They argue, however, that the worst

72. Id. at 167.
73. MODEL CODE R. 1.2; MODEL CODE R. 2.2; MODEL CODE R. 2.4(A). For an excellent elaboration on these issues, see David Pozen, The Irony of Judicial Elections, 108 COLUM. L. REV. 265 (2008).
75. See, e.g., Barry Friedman, Taking Law Seriously, 4 PERSP. ON POL. 261 (2006).
excesses have occurred in partisan election states, where judicial candidates are, by definition, partisans and where competition for judicial office has been most intense.

Data confirm that partisan races are, on average, more heated than nonpartisan races. The spending difference between partisan and non-partisan races is stark: between 1990 and 2004, average spending in contested non-partisan elections was $549,160, as compared to $885,177 in partisan races.\textsuperscript{76} Overall, the percentage of supreme court races in which the incumbent ran unopposed has been 16.9\% higher in nonpartisan contests.\textsuperscript{77} And between 1980 and 2000, defeat rates for incumbents in non-partisan races were 7.4\% as compared to 22.9\% in partisan races.\textsuperscript{78} One explanation for this data, however, may be that non-partisan races are less politicized because they furnish voters with insufficient information to promote competitive races; partisan affiliation can serve as a rough proxy for the candidate’s views on a range of issues that furnish voters with information they deem relevant to casting an informed ballot.

That said, non-partisan races have recently become much more competitive affairs. In the 1980s, 40.8\% of non-partisan judicial elections were contested, as compared to 62.5\% in the 1990s (in partisan races, the percentage of contested races increased from 58.8\% to 83.1\%).\textsuperscript{79} And a recent study conducted by Matthew Streb found that so-called “non-partisan” races may not be as non-partisan as commonly assumed:

How involved are party organizations in nonpartisan judicial campaigns? The answer appears to be that they are quite involved. While parties are not equally active in all aspects of nonpartisan judicial elections (and not necessarily active in every election cycle), they seem to be especially important in terms of GOTV [get out the vote] efforts and increasing name recognition, candidate recruitment, candidate endorsements, coordinating campaigns with candidates, and even raising and contributing money.\textsuperscript{80}

Of greater concern, perhaps, is the impact of White on the future of non-partisan elections. If candidates are held to have a constitutional right to announce their partisan affiliations and engage in partisan activities in non-partisan races, as the United States Court of Appeals ruled in White on remand, the practical differences between partisan and nonpartisan elections may gradually disappear. We have already seen, in states such as Michigan and Ohio,

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\textsuperscript{76} Chris Bonneau, The Dynamics of Campaign Spending in State Supreme Court Elections, in RUNNING FOR JUDGE, supra note 17, at 63-64.

\textsuperscript{77} Melinda Gann Hall, Competition as Accountability in State Supreme Court Elections, in RUNNING FOR JUDGE, supra note 17, at 172.

\textsuperscript{78} Id. at 177-78.

\textsuperscript{79} Id. at 173.

\textsuperscript{80} Matthew Streb, Partisan Involvement in Partisan and Nonpartisan Trial Court Elections, in RUNNING FOR JUDGE, supra note 17, at 96, 102.
where a nominally non-partisan general election is preceded by an openly partisan primary election process, that the resulting contests can be every bit as heated as in conventional partisan election states. In light of data indicating that when states relax campaign speech regulations in response to *White*, candidates alter their campaign speech to capitalize on the relaxed requirements, it is reasonable to predict that the same will occur if partisan activities restrictions are lifted.

### C. MERIT SELECTION WITH RETENTION ELECTION

Advocates of merit selection, like proponents of non-partisan election, proceed from the premise that a judge’s duty to follow the law makes judges sufficiently different from other public officials to warrant a different method of selection. The two camps part company, however, over the relative merits of contested elections. Supporters of merit selection operate on three assumptions: First, that contested elections are not a good way to ensure the selection of capable and qualified judges; second, that contested elections are inimical to judicial independence because they put judges at risk of losing their jobs for making decisions that are unpopular with voters who are incapable of discerning when a judge has followed the law, committed an honest error, or made an illegitimate power grab; and third, that “politicization” of judicial selection in hotly contested races diminishes public confidence in the courts. A system in which governors appoint judges from a pool of candidates pre-qualified by an independent commission, they maintain, is better suited to ensure that judges are selected on the basis of merit. To accommodate entrenched public preferences for judicial elections, merit selection systems typically provide for retention elections that, by virtue of being non-competitive, are less likely to become highly politicized, independence-threatening affairs that diminish public confidence in the courts.

Available data undercut the assumption that merit selection systems produce “better” judges: A study conducted in the 1980s comparing the resumes of judges chosen in contested elections and in merit selection systems found no significant differences—they possess comparable legal and judicial experience, and elected judges were no more likely than their merit-selected counterparts to have partisan political backgrounds. On a related note, recent research reveals that there is no meaningful difference between the systems in terms of the racial or gender diversity of the judges selected. That said, it is more difficult to quantify

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81. *See* Caulfield, supra note 17, at 49-55.
intangibles that could support the conclusion that merit-selected judges are "better" qualified, such as whether, on average, they possess a more judicial temperament, are predisposed to be more impartial and independent, or to think about the judicial role in less partisan or otherwise political ways. A California study, for example, compared judges initially appointed to those initially elected and found that between 1990 and 1999, 29.8 out of every thousand judges initially appointed had been disciplined, as compared to 43.6 out of every thousand judges who had been initially elected.\textsuperscript{84}

Recent data appear to corroborate the assumption that elected judges are more likely to align their decision-making with popular preferences than appointed judges, and to that extent are less independent. In their study of state supreme court reviews of capital cases, Paul Brace and Brent Boyea found "compelling but circumstantial evidence that state supreme court judges in capital cases may vote with an eye toward the next election," and that "appointed judges and judges that are retiring all exhibit a higher propensity to over turn capital convictions than elective judges who are not retiring,"\textsuperscript{85} leading them to a conclusion worth quoting at length:

In the end, the patterns revealed here indicate that judicial elections expose judges to public sentiment and, on this very salient issue at least, they respond by adjusting their voting in a manner than is consistent with public opinion. On this particular issue too, elections serve to recruit judges who share the public's values. Elections thus function in a manner commonly valued in some democratic theories, producing elite responsiveness to mass opinions. When it comes to judicial elections, however, our findings may give pause to those who value judicial impartiality, particularly when it comes to a matter of life and death.\textsuperscript{86}

Other studies have reached similar conclusions.\textsuperscript{87} Earlier studies comparing decision-making behavior of elected and merit selected judges, however, found no meaningful correlation between selection method and decision-making behavior.\textsuperscript{88} The discrepancy allows for several possible explanations: Voter

\textsuperscript{84.} STATE OF CALIFORNIA, COMMISSION ON JUDICIAL PERFORMANCE, SUMMARY OF DISCIPLINARY STATISTICS 1990-1999, at 13 (2000).
\textsuperscript{85.} Paul Brace & Brent Boyea, Judicial Selection Methods and Capital Punishment in the American States, in RUNNING FOR JUDGE, supra note 17, at 186, 193-94, 197.
\textsuperscript{86.} Id. at 199.
\textsuperscript{88.} See, e.g., RICHARD WATSON & RONDAL DOWNING, THE POLITIC OF BENCH AND BAR 324-26 (1969) (finding no difference between elected and merit-selected judges in their support for plaintiffs in personal injury litigation); Burton Atkins & Henry Glick, Formal Judicial Recruitment and State Supreme Court Decisions, 2 AM. POL. Q. 427 (1974) (finding no difference in decision-making behavior between merit selected and appointed judges with references to categories of litigant); Jerome O'Callaghan, Another Test for the Merit Plan, 14 JUST. SYS. J. 477 (1991) (finding no difference in drunk driving cases).
influence in contested elections may be limited to a few, highly salient issues (such as capital punishment); voter influence in contested elections may be on the rise as judicial elections become more competitive; or retention elections in merit selection systems, despite being less competitive than contested elections, may nonetheless influence judicial behavior in comparable ways.

Research reveals that in merit selection systems, politics can play a role in selecting members of nominating commissions, in the deliberations of such commissions, and in the judges that governors ultimately choose from the approved candidate pool. In response, the American Bar Association has developed standards for judicial selection that underscore the importance of preserving the independent, non-partisan character of judicial nominating commissions. To conclude from these developments, however—as some have—that merit selection systems simply move the politics of judicial selection from the ballot box to a back room misses an important point: the primary threat to independence arises at the point of re-selection, when judges are at risk of losing their jobs for unpopular decisions that they previously made. And on that score, there is ample support for the conclusion that, with notable exceptions, the prospect of an incumbent losing her seat in a retention election because of isolated, unpopular decisions is quite low. Whereas 23% of incumbent supreme court justices lost reelection bids in partisan elections between 1980 and 2000, and 7.4% lost in non-partisan races, the failure rate in retention elections was only 1.8%. And between 1964 and 1998, only 52 of 4,588 candidates in retention elections were not retained.

Finally, there is support for the conclusion that highly politicized judicial races diminish public confidence in the courts. In his Kentucky-based study, James Gibson found that “when groups with direct connections to the decision-maker give contributions, legitimacy suffers substantially.” He likewise found that when candidates use attack ads, legitimacy is adversely affected, albeit to a lesser degree. Gibson also explored the impact of candidate position-taking on public confidence, and found none, adding that “even promises to decide cases in specific ways have no consequences at all for the legitimacy of the institution”—although I question the validity of this finding, given the problematic vignette he used to elicit public reactions in his survey.

89. See Reddick, supra note 83, at 732-34.
92. Gibson, supra note 44, at 17; see also Geyh, supra note 41, at 54-55.
93. Gibson, supra note 44, at 19. The author notes that these findings applied equally to legislative races.
94. The survey solicited reactions to a vignette in which a judge talks about his views on law suit abuse, abortion, and the death penalty, and “promises that, if reelected, he will decide these kinds of cases the way that most people in Kentucky want them decided.” It is to be expected that respondents would be untroubled by this scenario, because the judge was, in effect, simply saying, “When cases come before me, I promise to do what
D. APPOINTMENT WITHOUT RE-SELECTION

In the current debate, few have argued for a system of legislative appointment. Some (including I) have argued that the optimal system for judicial selection is one in which judges are appointed by governors from a pool of commission-approved candidates, with or without legislative confirmation, who, once appointed, are not subject to reselection (via reappointment, retention election, or contested election).95 Such arguments operate from the premise that an appointive system alone promotes judicial independence by ensuring that a judge will not be put at risk of losing her job for making unpopular decisions that comport with the law as the judge reads it. Proponents of appointive systems assume that accountability is better promoted by means other than the ballot box: appellate review, constitutional amendment, adverse publicity, and intra-judicial disciplinary processes, and of course, prospective accountability fostered by the appointment process itself.

Although few judges actually lose their retention bids in merit selection states, the real issue is whether judges nonetheless fear defeat at the ballot box and act on that fear by deciding cases differently than they otherwise would. Malia Reddick reports on a 1991 survey of judges who recently stood for retention, in which three-fifths of respondents reported that “retention elections had a pronounced effect on their behavior on the bench”; only 14% believed that retention elections gave them independence from the voters, while “the remaining judges perceived themselves as responding to their environment.”96

As far as other accountability-promoting mechanisms are concerned, the Model Code of Judicial Conduct includes rules directing judges to be “faithful to” or to “uphold and apply” the law.97 These rules have been used more often than one might suppose to discipline and sometimes remove judicial officers who chronically or flagrantly disregard the rule of law in a range of contexts.98

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95. Geyh, supra note 41, at 72-79; Justice in Jeopardy, supra note 19, at 70-74.
97. Model Code R. 2.2; 1990 Model Code Canon 3B(2).
IV. WHERE TO FROM HERE?

Ultimately, which of the various systems for judicial selection is "best" depends upon what one is looking for. If one is looking for a system that maximizes democratic accountability, then available data suggest that partisan elections will ordinarily be optimal. Conversely, if one is looking for a system that maximizes judicial independence, simple appointment (with or without a nominating commission) that does not subject incumbents to a reselection process will usually be the best bet. Non-partisan election and merit selection/retention election systems seek to strike a balance between these relative extremes, with non-partisan election systems placing somewhat greater emphasis on democratic accountability and merit selection/retention elections opting for somewhat greater independence.

Arguments over the relative merits of democratic accountability and judicial independence may be deeply normative, but turn in large part on an unresolved empirical question of considerable importance: Whether independent judges follow the law, and if so, how and to what extent. If the answer is "no," as many political scientists believe, then the primary justification for judicial independence disappears. If law does not constrain judges in any meaningful way—if independent judges are essentially rogue policymakers—the norms of a democratic republic dictate that judges be brought under greater popular control, so that the preferences judges act upon are better aligned with their "constituents." Conversely, if, as most judges and lawyers believe, the answer is to some significant extent "yes"—if independent judges do indeed take law seriously—then judicial independence is back in the game. To study this question demands a more serious interdisciplinary effort than has occurred to date—and that is no mean feat. Too many political scientists and lawyers look at each other and shake their heads, so captured by the predispositions of their respective disciplines that they are unable or unwilling to take the other seriously.

For those who have been struggling to preserve and promote an independent judiciary, however, the time has come to confirm the empirical foundations upon which their case rests, or rethink their premises.

I share Barry Friedman's impressionistic sense that outside the political science subfield of attitudinal model scholars, "most likely there is agreement

99. If there is no reality to the rule of law, the only remaining justification for judicial independence would seem to be a highly precarious one, that public confidence in the judiciary turns on promoting the rule of law "myth," a key component of which is judicial independence. See Gibson, supra note 44, at 5-6 (discussing the "myth of legality" and how it is preserved by exposing the public to legitimizing "symbols of impartiality and insulation from ordinary political pressures"); see also Charles Gardner Geyh, The Judgment of the Boss on Bossing the Judges: Bruce Springsteen, Judicial Independence and the Rule of Law, 14 WIDENER L.J. 885, 902-05 (2005) (discussing the "mythical aspects" of the rule of law).

100. For an excellent discussion of the divide that separates academic lawyers and political scientists, see Friedman, supra note 75, at 261-262.
that attitudes and law both play a role—the question is how much, and more particularly, how much law can constrain. To state it differently, the question is not so much whether law plays a role, as what role it plays.” If so, then judicial independence remains a value worth preserving, but the operative question continues to be how much independence in relation to democratic accountability is optimal. Put another way, when (if ever) does the cost of enabling judges to act upon their political preferences or attitudes by insulating them from democratic accountability exceed the benefits of protecting them from threats to their tenure that compromise their capacity to adhere to the rule of law?

These are big questions that call for big choices between selection systems. Constitutional reform culminating in changes on this order of magnitude is a rare event. It can be a worthy goal and one well worth pursuing (as I have argued elsewhere), but not at the expense of ignoring shorter-term remedies that can make a bad system better in the interim. From the vantage point of those who want greater democratic accountability, the short-term solution is simply to let nature take its course, because the current trajectory of judicial races across the country is already leading in that direction. For those seeking to promote an independent judiciary in the teeth of recent developments, more modest reforms proposed by scholars and organizations, include:

- Increasing the length of judicial terms, to reduce the frequency with which judicial tenure is put at risk.\(^{102}\)
- Encouraging candidates to adopt voluntary campaign standards, to reduce negative campaigning and thwart the impact of *White*.\(^{103}\)
- Continuing to defend existing ethical restrictions on judicial campaign conduct against constitutional challenge, at least until the Supreme Court clarifies the limits of *White*.\(^{104}\)
- Developing more comprehensive judicial evaluation programs to provide voters in retention elections with more meaningful information about incumbents that reorient voter focus toward behavioral, rather than decisional accountability.\(^{105}\)
- Increasing public knowledge about the role of the judiciary in American

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101. Id. at 264.
104. Geyh, supra note 103.
government, which has been shown to increase public support for judicial independence.\textsuperscript{106}

- Taking judicial discipline seriously, as a means to underscore an important way in which judges who behave badly are properly held accountable.\textsuperscript{107}

- Public financing of judicial campaigns at the appellate level, to reduce the influence of money on judicial races.\textsuperscript{108}

- Expanding use of voter guides as a means to better inform voters about the candidates.\textsuperscript{109}

\section*{V. Conclusion}

In our existing legal structure, states lay claim to having independent judiciaries, whose judges take oaths to uphold the law. They have codes of judicial conduct that direct judges, on pain of discipline and removal, to follow the law and resist public and political pressure to do otherwise. And they require judges in all courts of general jurisdiction to have training and experience in the law, because unlike legislators and governors who make or execute the law, judges who interpret the law must possess special expertise that non-lawyers lack. These features of the legal structure are compatible with judicial elections as originally conceived. As originally envisioned, contested elections were to promote judicial independence and the rule of law by transferring control of judicial selection from manipulative governors and legislatures to the people, and were to promote behavioral accountability by weeding out the incompetent, the lazy and the corrupt.

In the new world order, however, the primary justification for contested judicial elections has moved from preserving judicial independence and behavioral accountability to promoting decisional accountability by subjecting judges to loss of tenure for making decisions unpopular with the electorate. This new justification is fundamentally incompatible with the principles that underlie the existing legal structure. It assumes either that average voters are able to review judicial decisions for themselves and intelligently second guess a judge's interpretations of law, or that the decisions judges make are matters of public policy rather than law, which voters have a right to control. The first assumption is at odds with the notion embedded in state law, that intelligently interpreting the law requires judges who have years of legal training and expertise that


\textsuperscript{107} \textit{Justice in Jeopardy}, supra note 19, at 58-59.


\textsuperscript{109} \textit{Call to Action}, supra note 102, at 1357.
non-lawyers lack. The second assumption—that judges simply make policy masquerading as law—guts the rule of law altogether and de-legitimizes constitutional structures and codes of conduct that preserve judicial independence.

Looking toward the future, there are three possibilities. First, we may simply continue to live with cognitive dissonance: highly competitive judicial elections and democratic accountability may be incompatible with the rule of law and judicial independence, but practical impediments to systemic change suggest that our time is better spent on incremental reform that reduces the incompatibility. Second, we may adjust the underlying legal structure to accommodate a new world of competitive judicial elections, by gradually distancing ourselves from the rule of law as a fiction of the bygone formalist age, and embracing contested elections and the democratic accountability they promote. Third, we may adjust judicial selection systems to accommodate the existing legal structure by moving away from highly competitive contested elections that are fundamentally at odds with the rule of law and an independent judiciary.

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112. See, e.g., Geyh, supra note 41, at 58-61.